8-18-1976

James L. West v. Wanda Lou West

Appellee's Brief 1976-SC-0285

APPELLEE'S BRIEF

9628

SUPREME COURT OF KENTUCKY
NO. 76-285

JAMES L. WEST, APPELLANT,

VS:

WANDA LOU WEST, APPELLEE,

APPEAL FROM BOYD CIRCUIT COURT
HON. CHARLES S. SINNETTE, JUDGE

BRIEF FOR APPELLEE

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Copies of this Brief for Appellee have been served upon Appellant's Attorney, William I. Bubenzer, 1491 Dixie Highway, Covington, Kentucky, 41011, and the Trial Judge, Hon. Charles S. Sinnette, Boyd Circuit Court, Court House, Catlettsburg, Kentucky, as required by R.C.A. 1.250, this 14 day of July, 1976.

Counsel for Appellee

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STATEMENT OF THE QUESTIONS PRESENTED

I. WHERE AFFIDAVIT, MOTION, AND EVIDENCE UNDER A KRS 403.250 MOTION TO MODIFY AND/OR TERMINATE A PERIODIC MAINTENANCE ALLOWANCE TO A WIFE (MADE ONLY TWO MONTHS AFTER THE DECREE) FAIL TO SHOW THAT THE WIFE IS EARNING A LIVELIHOOD AND THAT THE HUSBAND EARNS A SUBSTANTIAL SALARY, DOES THE COURT ERR IN REFUSING TO TERMINATE OR MODIFY THE PERIODIC ALLOWANCE?

II. WHERE PRIOR TO MARITAL DISSOLUTION, THE COURT ENTERS AN ORDER FOR TEMPORARY MAINTENANCE FOR A WIFE AND CHILD SUPPORT IN A GROSS SUM OF $35.00 PER WEEK, PENDING THE FURTHER ORDERS OF THE COURT, DOES THE REACHING OF THE AGE OF MAJORITY OF THE PARTIES' CHILD PRIOR TO MARITAL DISSOLUTION TERMINATE THE IN-GROSS AWARD WITHOUT MOTION AND COURT ACTION?

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MAY IT PLEASE THE COURT:

COUNTER STATEMENT OF THE CASE

The Decree of Dissolution was entered July 11, 1975. Appeal was taken from the marital distribution and award of periodic maintenance. The Supreme Court dismissed this appeal on September 3, 1975. Only 42 days later, on October 16, 1975, Appellant made an Affidavit stating that the Court's finding that Appellee was unable to work at a steady job and was entitled to periodic maintenance was unconscionable. The Appellant's motion, filed October 27, 1975, only 53 days after the final judgment asked the Court to reconsider the judgment which had become final. Hearing was held and Findings of Fact, Conclusions of Law and Order adverse to Appellant was entered November 6, 1975. A motion to amend was filed and was overruled November 21, 1975.

After the notice of appeal was filed, further proceedings were pursued by Appellant in the circuit court regarding the alleged $420.00 arrearage. A final order was entered as to the $420.00 arrearage on January 9, 1976, from which no appeal was taken. This order, entered long after the time for designating the record had expired, is not a part of the

record. The Appellee has tendered it as a supplemental record and moved this Court that it be filed.

The record shows that the Appellant has a substantial usable income and that the Appellee, who has recently purchased a restaurant, is making no usable income.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN FAILING TO TERMINATE AND/OR MODIFY OR SET REASONABLE TERMS FOR MAINTENANCE.

Judgment of dissolution was entered on July 11, 1975. Appeal was taken to the Supreme Court and the appeal was dismissed by the Supreme Court on September 3, 1975.

In less than two months, on October 27, 1975, the Appellant filed a motion in circuit court to reconsider and modify the decree of July 11, 1975, appeal from which had been dismissed by this court on September 3, 1975. There is nothing in the affidavit, evidence, or brief to indicate than any of the requirements of KRS 403.250 had occurred since entry of the decree of dissolution to warrant a modification of the decree. Kentucky Revised Statute 403.250 provides:

> "KRS 403.250. [Modification or termination of provisions for maintenance, support and property disposition.--(1) Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. . .]"

Appellant does not factually charge or argue "changed circumstances so substantial or continuing so as to make the terms [of the decree] unconscionable."

Appellant in brief argues the provisions of KRS 403.200, which applies only to the initial granting of maintenance upon dissolution. That issue was decided adversely to appellant by the decree of July 11, 1975, appeal from which was dismissed by the Supreme Court on September 3, 1975.

Aside from the failure of the appellant to argue his appeal under the applicable law, the evidence is clear that the appellee is presently earning no income. Appellant has a substantial income. In the order appealed from the court found that "the records produced in court shows that the petitioner, although she owns her own restaurant, is deeply in debt and she cannot survive without payment of the maintenance award in the original decree." The burden was on appellant to show that the decree should be modified. In this he failed, and the court made no error in refusing modification. McKenzie v. McKenzie, Ky., 502 S. W. (2d) 657. Appellant has shown no abuse of discretion. Gann v. Gann, Ky., 347 S. W. (2d) 540.

II. THERE IS NO ERROR IN THE FINDING OF THE COURT THAT APPELLANT WAS IN ARREARS IN THE SUM OF $420.00.

After the entry of the order appealed from and after the time for designation of records had long expired, further proceedings upon appellant's motion were had in circuit court regarding the $420.00 arrearage argued as issue II in appellant's brief. This order, entered January 9, 1976, is not a part of the designated record on appeal, but, nevertheless, appellee believes, is binding upon the parties. No appeal has been taken from the order of January 9, 1976. Appellee has tendered a certified copy of the January 9, 1976 order as a supplemental record with a motion that it be filed.

Should the Supreme Court not consider the order of January 9, 1976, nevertheless, the arrearage of $420.00 is owed. The initial temporary

allowance was in a gross sum for "maintenance and child support until the further orders of the court." The reaching of the age of majority of the parties' child before entry of the final decree did not ipso facto stop the temporary award. It may well have been that had the appellant or appellee so moved, the trial court might properly have revised the amount by either increasing or decreasing the maintenance with no child support. No such relief was requested by either party. A maintenance and support judgment is binding on the parties until modified by order of the court. Bailey v. Bailey, Ky., 294 S. W. (2d) 942.

CONCLUSION

There was no showing of substantial and continuing changed circumstances which warranted a termination, modification or change of the decree entered less than two months before the motion to terminate or modify was made. The order of temporary maintenance and child support in a gross and unseparated sum did not stop when the child reached age 18, a few months before entry of the final decree.

There is no error in the record and the appeal should be denied.

Respectfully submitted,

CREECH & HOGG

BY: _____

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